No. 10616

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CLAIBOURNE RANDOLPH TATUM,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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TABLE OF AUTHORITIES CITED.

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Preliminary Statement.

Bagley v. United States (9th Cir.), No. 10574, decided June 14, 1944, as claimed by the appellee (Brief for Appellee, p. 5), authoritatively, definitively and unequivocably disposes, adversely to the appellant, of the issue of the availability to the appellant, as a defense to the instant indictment, of the denial of due process by the Selective Service agencies. This we concede.

Remaining in the instant case, however, is the important question as to whether the prosecutor's argument to the jury was so prejudicial as to require a reversal of the judgment, and thus afford the appellant an opportunity to have a new and fair trial.

ARGUMENT.

I.

The United States Attorney's Argument to the Jury Was Prejudicial, and Requires the Reversal of the Judgment.

The attempt at justification by the appellee in its brief of the remarks addressed by the prosecutor to the jury, is without merit. Statements made by the appellant, upon cross-examination, are torn from their context and seized upon, as warranting, what would otherwise clearly seem to be, a prosecutor's appeal to passion and prejudice of the jury, rather than an address to its reason and sense of fairness.

Thus the appellant did not merely state, as claimed by the appellee (Brief of Appellee, p. 6), "that the members of our armed forces are committing murder"; but the appellant explained his position thus:

> "The law is, 'Thou shalt not kill.' According to my doctrine the taking of life is murder. *I have the greatest respect for the fact that those in the Army are making a sacrifice in their own conscience, believing they are doing the right thing, and are above reproach because they believe they are doing the right thing.* But from the standpoint of universal law they are committing murder. It is not my opinion; it is already stated in the Bible." [R. 38.] (Italics ours.)

In any event, what possible justification can be found, for the use of such emotion stirring, and passion arousing language on the part of the prosecutor "I call your attention to the blood of the battlefield." [R. 50.]

That there was no justification or warrant for such a prejudicial plea is demonstrated by the lame explanation proffered by the prosecutor when objection was taken by defense counsel to the prosecutor's argument. Said the prosecutor:

> "I see nothing prejudicial about it, and I say to Your Honor—with all respect this is—it is the Selective Service System, and under the Selective Service Act if a man is called and refuses to respond, someone else must be called." [R. 50.]

Moreover, the defendant, under sharp cross-examination by an earnest and over-zealous prosecutor, who apparently was seeking to provoke statements from the defendant which could be used against him by the prosecutor in an impassioned plea to the jury, nonetheless at no time cast, by inference or otherwise any "stigma of traitor to God" upon those fighting in our armed forces, as charged by the prosecutor in his plea to the jury. [R. 50.] All the defendant stated upon cross-examination was:

> "I believe that those who go into the Army are doing something incompatible with Christian principles but *I do not condemn them for it. I would be a traitor to God if I went into the armed forces.*" [R. 37.] (Italics ours.)

It is noteworthy, moreover, that when defense counsel objected to the misstatement by the prosecutor and charged that the remark was "an unwarranted inference from any of the evidence in this case, and a consciously improper effort by the prosecutor to appeal to the prejudice of the jury." [R. 50.] The prosecutor countered

with additional misconduct by accusing, before the jury, defense counsel of having attempted to appeal to the passion and prejudice of the jury [R. 51].[1] Thereupon the prosecutor announced that he would withdraw his argument; and the Court stated to the jury that the statements of both counsel to be disregarded [R. 51]. But obviously the prejudicial misconduct by the prosecutor had by that time had its effect upon the jury; and judicial white-wash at that point, while it might have the appearance of covering the error, did not remove its indelible prejudicial effect.[2]

Surely the prosecutor's remarks must be deemed to be more offensive to the "dignity and good order with which all proceedings in Court should be conducted,[3] and much more offensive than anything the zealous prosecutor said to the jury in the *Viereck* case. The conduct of the prosecutor robbed the appellant in the instant case of his "day in court," and of his right to a fair trial. It has been said that the law should be "fearlessly enforced, without fear or favor, and that all men shall have a fair trial, is of greater value to society than a record of convictions."[4]

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[1]No objection of any kind was voiced by the prosecutor to any conduct on the part of defense counsel up to that time.

[2]An affidavit is submitted herewith set forth in the appendix, reciting the circumstances under which the objections to the prosecutor's argument were made by defense counsel. The absence of a record reciting exactly what transpired, would seem to warrant the filing of such an affidavit.

[3]*Viereck v. United States*, 318 U. S. 236, 87 L. Ed. 734.

[4]*Beck v. United States*, 33 F. (2d) 107, 114.

Conclusion.

The judgment should be reversed so that the appellant may be afforded an opportunity to have a fair trial—one free from the prejudicial impregnation of prejudice of the jury, resulting from the prosecutor's fluent but unfair tongue.

Respectfully submitted,

A. L. WIRIN and
J. B. TIETZ,

WAYNE M. COLLINS,
THEODORE TAMBA,

By A. L. WIRIN,

Attorneys for Appellant.

APPENDIX A.

In the United States Circuit Court of Appeals for the Ninth Circuit.

Claibourne Randolph Tatum, appellant, vs. United States of America, appellee. No. 10616.

Affidavit of A. L. Wirin.

United States of America, State of California, County of Los Angeles—ss.

A. L. Wirin, being first duly sworn, deposes and says:

That he is one of the attorneys for the appellant; and the attorney who represented the defendant at the time of, and in the course of, the trial before a jury in the District Court below.

During the entire trial, including the arguments of counsel, a court reporter was present in the District Court.

The affiant assumed, from the practice in the United States District Court for the Southern District of California, to which District the affiant's practice is very largely confined, that said court reporter was taking notes of the arguments of counsel, as well as of the submission of evidence. After the conclusion of the trial, in connection with the preparation of a bill of exceptions, a request for a transcript of the entire proceedings having been made upon said reporter, the affiant learned for the first time that the court reporter had taken notes, so far as the oral arguments to the jury were concerned, only of the portions with respect to which exceptions were taken.

Prior to the time that the prosecutor made the statement, in the course of his oral argument, excepted to by the affiant, appearing in the Transcript of Record at page 50, said prosecutor, in the opinion of the affiant, made a number of prejudicial statements constituting an appeal to the passion and prejudice of the jury, but the affiant took no exception thereto; first, because he was conversant with the decision in *Viereck v. United States,* 318 U. S. 236; 87 L. ed. 734, holding that no exception is necessary where the prosecutor's argument is clearly prejudicial; and secondly, because the affiant felt that the jury would be influenced adversely to the defense if the affiant interrupted the prosecutor's argument. When the prosecutor's argument reached its peak in its emotionalism, however, and the prosecutor used the phrase, "the blood of the battlefield", the affiant then determined that the prosecutor's argument was so prejudicial as to warrant incurring the displeasure of the jury and requiring express exception on the part of the defendant. The affiant then interrupted the prosecutor, and made objection and exception on two occasions.

A. L. WIRIN.

Subscribed and sworn to before me this 10th day of July, 1944.

(Seal) J. B. TIETZ,
Notary Public in and for said County and State.

My commission expires Feb. 28, 1948.